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No. 90-959

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

**PATRICK W. SIMMONS, McLAY GRAIN COMPANY,
and EDENFRUIT PRODUCTS COMPANY,**

Petitioners,

v.

**INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, and
CHICAGO-CHEMUNG RAILROAD CORPORATION,**

Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

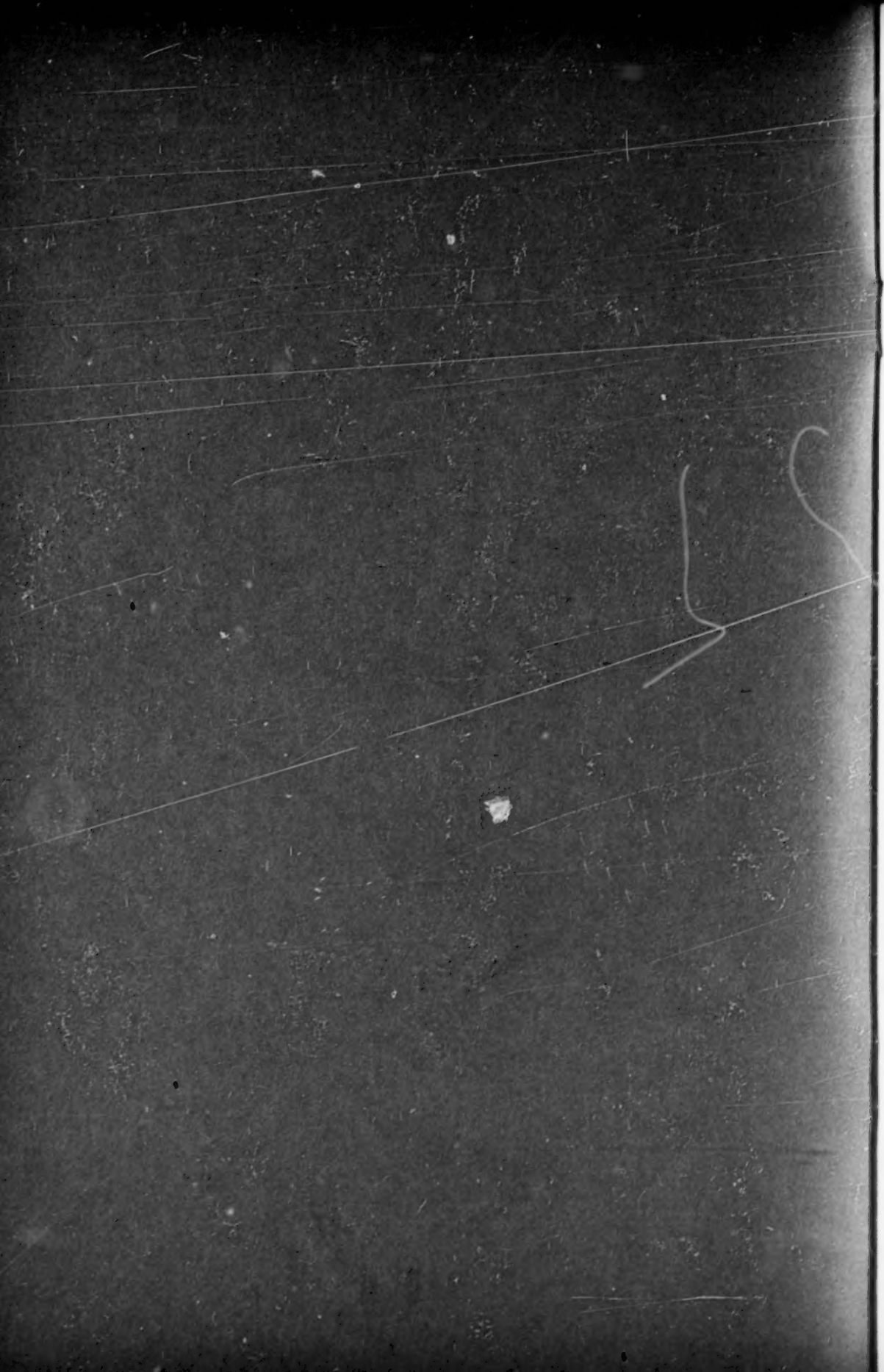
**BRIEF IN OPPOSITION FOR RESPONDENTS
CHICAGO & NORTH WESTERN
TRANSPORTATION COMPANY and
CHICAGO-CHEMUNG RAILROAD CORPORATION**

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February 15, 1991

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QUESTIONS PRESENTED

1. Whether a representative of rail carrier employees has standing to petition for review of Interstate Commerce Commission orders upholding the validity of a rail line acquisition and a rail line abandonment solely on the basis of the employees' interest in job retention.
2. Whether industries which are not served by a rail line proposed for abandonment have standing to seek judicial review of an Interstate Commerce Commission order upholding the validity of a rail line abandonment where overturning the ICC order will not in itself restore train service over the line and the abandonment will not result in the loss of rail service to those industries.

RULE 29.1 STATEMENT

Respondent Chicago & North Western Transportation Company is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting preferred stock of Chicago & North Western Holdings Corporation. Respondent Chicago & North Western Transportation Company has the following subsidiaries apart from wholly-owned subsidiaries within the meaning of Rule 29.1 of this Court: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc. and C&NW Realco, Inc.

Respondent Chicago-Chemung Railroad Corporation is not owned by a parent corporation and does not have any subsidiaries.

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from two decisions of the Court of Appeals for the Seventh Circuit in which the court dismissed petitions for review of Interstate Commerce Commission orders. In Docket No. 88-3207, Patrick W. Simmons sought review of Interstate Commerce Commission orders approving a rail line sale involving respondents Chicago & North Western Transportation Company ("C&NW") and Chicago-Chemung Railroad Corporation ("CCRC"). (The "Acquisition Case") In Docket Nos. 88-3211 and 89-1961, Patrick W. Simmons, McLay Grain Company, and Edenfruit Products Company sought review of Interstate Commerce Commission orders refusing to revoke C&NW's Abandonment Exemption for an "out-of-service" rail line. (The "Abandonment Case") Both petitions were dismissed by the Seventh Circuit for lack of standing on the part of the petitioners. As will be discussed below, the Seventh Circuit decisions are thoroughly consistent with the precedents set forth by the United States Supreme Court and the Circuit Courts of Appeal. Accordingly, respondents C&NW and CCRC respectfully request that the Petition for a Writ of Certiorari be denied.

1. The Acquisition Case

This case involved acquisition of a 3.5 mile rail line (including incidental trackage rights) from the C&NW, for operation by a new carrier, the CCRC. The line extends from Harvard to Chemung and is located in the State of Illinois. The acquisition was consummated pursuant to the Class Exemption adopted by the Interstate Commerce

Commission ("Commission") in connection with sales of a rail line for operation by a new carrier. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom., Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987) ("Class Exemption") Patrick W. Simmons challenged this exemption, first with a petition for stay, then with a petition for revocation, and, finally, with a petition to reopen. The Commission reviewed each and every one of Simmons' arguments, found them to be thoroughly meritless, and refused to stay or revoke the exemption. Thereafter, Simmons sought review of these orders in the U.S. Court of Appeals for the Seventh Circuit.

Much of Simmons' argument before the Commission and the Seventh Circuit attempted to cast this proceeding in the context of an abandonment proceeding. This did not accurately portray the transaction. This case involved an acquisition from C&NW of a short line and the creation of a new short line rail carrier. The acquisition has resulted in the continuation and preservation of rail service to any and all shippers located on the line which was acquired. No shippers, either on this rail line or any adjacent rail line, have lost rail service in consequence of this acquisition. Indeed, no shippers on the line joined with Simmons in the petition for review.

In enacting the Class Exemption for rail line sales where a new carrier is involved, the Commission concluded that the exemption of these transactions from regulation would foster the National Rail Transportation Policy, "by minimizing the need for federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail

management." 1 I.C.C. 2d at 817. This Class Exemption is intended to serve both shipper and community interests by facilitating continued rail service on lines that the selling carrier can no longer operate economically, by new, smaller carriers which can provide the service more efficiently. 1 I.C.C. 2d at 817.¹

The acquisition of this 3.5 mile Harvard-Chemung line by CCRC fell squarely within the purposes enunciated by the Commission when it adopted this Class Exemption. Instead of pursuing a possible abandonment of the Harvard-Chemung line, with resultant loss of rail service to shippers, C&NW entered into a sale of the rail line for operation by a new local carrier in order to preserve con-

¹ For many years, both entry into and exit from the railroad industry have required prior extensive regulatory review and approval by the Commission. For example, under 49 U.S.C. §10901, the Commission must evaluate whether the present or future public convenience and necessity require or permit the acquisition or operation of a rail line by the carrier involved. Similarly, under 49 U.S.C. §10903, the Commission must determine whether the public convenience and necessity permit the abandonment of rail operations over a line. However, in 1980, in response to the serious financial conditions in the railroad industry (which included a series of major bankruptcies in connection with large railroad carriers), and increased competition with motor carriers, barges and airlines, Congress limited the extent of the Commission's rail regulation. As is pertinent here, Congress expanded the Commission's power under 49 U.S.C. §10505 to exempt rail transactions and services from regulatory requirements. The Commission is now directed to exempt transactions or services from its regulation whenever it finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from abuse of market power. 49 U.S.C. §10505(a). The Class Exemption discussed herein with respect to acquisition by new carriers and the "Notice of Exemption" which will be discussed *infra* in connection with abandonment of "Out-of-Service" rail lines are among the exemptions promulgated by the Commission in response to this Congressional direction.

tinued service to shippers on the line. Thus, as the Commission concluded when it enacted the Class Exemption:

“The vital interests of shippers, communities and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost.” 1 I.C.C. 2d at 817.

Simmons claimed that the Commission should be required to make statutory “public convenience and necessity” findings with respect to this transaction under 49 U.S.C. §10901. However, Simmons’ claims were nothing more than an impermissible collateral attack on the foundations of the Class Exemption itself. The Commission has exempted these types of line sales from regulation under 49 U.S.C. §10901, and that decision has been affirmed on review. *Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir., 1987). The Commission was not and is not required to re-examine the underpinnings of the Class Exemption each time a new line sale occurs. Here, the evidence established that this sale would preserve viable line service to shippers on the Harvard-Chemung line, and Simmons presented no evidence to the contrary. As the Commission stated in this proceeding:

“Here Simmons has not provided specific evidence to support his challenge to CCRC’s viability and there is no evidence before us suggesting that CCRC will not be viable, financially or otherwise.* * *

Simmons’ generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line. Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line’s shippers.” (Pet. at 40a, 41a)

Simmons also claimed, without any evidentiary basis whatsoever, that the transaction would result in C&NW personnel losing employment. Simmons' claim in that regard was the unremarkable proposition that C&NW employees who formerly worked on the Harvard-Chemung line could not continue to do so. He did not provide any evidence whatsoever that any C&NW employees would actually lose their jobs.

Significantly, Simmons did not even *attempt* to make the requisite showing necessary for the imposition of labor protective conditions. As will be discussed in greater detail below, these Commission imposed conditions provide a compensatory remedy for employees affected by a Commission authorized transaction. Simmons did *not* allege, or even suggest, "exceptional circumstances" purporting to justify the imposition of labor protective conditions on this transaction. Absent such "exceptional circumstances," labor protective conditions will not be imposed. *Class Exemption*, 1 I.C.C. 2d at 815; see also, Pet. at 46a, 47a.

On Petition for Review before the U.S. Court of Appeals for the Seventh Circuit, Simmons did not claim that the Commission erred in failing to impose labor protective conditions, nor did he suggest to the court the existence of any exceptional circumstances warranting imposition of said conditions. Rather, Simmons opposed the acquisition generally in reiterating his claims that CCRC's operations would not be viable and industries not located on the line would allegedly be adversely affected. Indeed, Simmons' only assertion on appeal with respect to C&NW employees came in his reply brief in which he suggested that C&NW employees would no longer be able to work on the Harvard-Chemung line due to the sale to CCRC.

The Seventh Circuit Court of Appeals concluded that substantial evidence in the record supported the Commission on the merits. However, the Court did not rule on the merits of Simmons' arguments, because it found that Simmons lacked standing to present them to the Court. The Court noted that the only alleged injury to rail labor interests is possible loss of jobs. *Simmons v. I.C.C.*, 909 F.2d 186, 189 (7th Cir. 1990). The Court found this sufficient to meet the Article III standing requirements, but not the "zone of interest" requirement (prudential limitation) as set forth in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), as clarified in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987). 909 F.2d at 189-190. The Court concluded that the Act is not intended "to protect a rail employee's interest in retaining his job," and that "the Act's zone of interests does not encompass the only (labor) interest which Simmons alleges the ICC's action threatens." *Id.* at 190.

Finally, the Court held that, absent standing in his own right, Simmons lacks standing as a representative of the public interest, citing *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). *Id.* at 190. Simmons' petition for rehearing and suggestion for rehearing en banc was denied.

2. The Abandonment Case

This case involved the abandonment of a 6.5 mile no-business rail line by the C&NW. The line extended from Milepost 67.5 west of Chemung to Milepost 74.0 east of Poplar Grove, and was located in the State of Illinois ("Chemung-Poplar Grove line"). The abandonment was consummated pursuant to the Notice of Exemption procedures adopted by the Commission in connection with

the abandonment of out-of-service rail lines. See *Exemption of Out-of-Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C. 2d 55 (1984), *remanded*, *Illinois Commerce Commission v. I.C.C.*, 787 F.2d 616 (D.C. Cir. 1986), *aff'd*, *Illinois Commerce Commission and Patrick Simmons v. I.C.C.*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783.

The Chemung-Poplar Grove line served no one. No rail traffic originated or terminated on the line in the two years preceding C&NW's filing of the Notice of Exemption. Indeed, as petitioners candidly admitted before the Commission and the Seventh Circuit, no shippers or receivers were located on the line. In fact, there was no evidence that anyone at any time ever originated or terminated traffic on this line.

Further, no off-line overhead traffic had moved over this rail line in over one and one-half years prior to the filing of the Notice of Exemption. Any such overhead traffic had long since been rerouted onto a duplicate parallel C&NW main line.

The eastern end of this rail line adjoined a 3.5 mile line segment extending from Harvard to Chemung, which was the subject of the Acquisition Case. The western end of the Chemung-Poplar Grove line was located adjacent to a 13.4 mile line segment extending from Poplar Grove to South Beloit. The two line segments were severed by a 624 foot derailment. Since approximately November of 1986, any Poplar Grove traffic had been routed via C&NW's duplicate parallel line extending between South Beloit and Harvard.

The petitioners in this case shared a common thread, to wit, none of them were adversely affected by this abandonment. Patrick W. Simmons purported to represent a

segment of C&NW's transportation employees. In view of the fact that no transportation service was provided on the subject line, and no shippers were losing service as a result of this abandonment, no transportation employees were adversely affected.

McLay Grain Company ("McLay") is an industry located at Poplar Grove. McLay had not shipped by rail since the 1970's, and had shipped exclusively via trucks since that time (Pet. at 42a). In any event, this abandonment did not eliminate service to any Poplar Grove industries, or any industries at all for that matter.

Petitioner Edenfruit Products Company ("Edenfruit") is also an industry located at Poplar Grove. Edenfruit shipped no cars in 1985, one car in 1986 and none since that time. (Pet. at 42a). And, once again, Edenfruit was *not* located on the subject line segment, it was *not* served by the subject line and it has *not* lost service as a result of the abandonment of this line.

No actual rail shippers on C&NW's rail system opposed this abandonment before the Commission or participated in post-Commission review proceedings. No communities near the line exhibited any opposition to this abandonment. Indeed, petitioners attempted to include the Village of Poplar Grove in their opposition pleadings before the Commission, and Poplar Grove specifically required petitioners to withdraw its name from the opposition.

The Commission confirmed this Notice of Exemption by a decision dated October 14, 1988.² In addition to con-

² Petitioners did not attach a copy of the Notice of Exemption to their petition. As such, respondents have attached a copy of the Notice of Exemption hereto, as Appendix A.

firming the Abandonment Exemption, the decision imposed standard labor protective conditions for any employees affected by the abandonment, pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

Petitioners challenged the Notice of Exemption, first with a petition for stay, then with a petition to revoke the exemption. They claimed that C&NW was improperly abusing market power by segmenting three line segments, to wit, Harvard to Chemung (The Acquisition Case), Chemung to Poplar Grove (The Abandonment Case), and the third segment from Poplar Grove to South Beloit, which was not the subject of any pending proceeding, and which served all shippers at Poplar Grove.

There was no allegation of any adverse impact on employees. Nor did petitioners claim that the labor protective conditions imposed by the Commission were insufficient. Further, petitioners did not assert that any shippers would lose direct service in consequence of this abandonment. Rather they claimed, in effect, that shippers at Poplar Grove would only have access from one rail line route instead of two, and the available route is allegedly more circuitous (32 miles as opposed to 10 miles).

The Commission rejected petitioners arguments. It noted that there were not two rail line routes available to Poplar Grove shippers in view of the sale of the Harvard-Chemung line in the Acquisition Case and the derailment east of Poplar Grove. The Commission stated that "Petitioners ignore the fact that the C&NW no longer has a line between Harvard and Chemung since its sale to CCRC. It is difficult to see how C&NW can abuse a market on a line which it no longer owns or operates." (Pet. at 67a)

As to the derailment, the Commission noted that "even if the C&NW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the money-losing Chemung-Poplar Grove operation." (Pet. at 66a, n. 5) Further, the Commission stated that "repairing the derailment and re-instituting the money-losing Chemung-Poplar Grove operation would seem to be neither an efficient use of carrier resources nor good management; nor it is necessary to foster sound transportation or sound economic conditions in transportation." (Pet. at 69a)

Finally, the Commission refused to accept petitioners suggestion that C&NW could not abandon the Chemung-Poplar Grove rail line until it filed for an abandonment of the adjacent Poplar Grove-South Beloit line. As discussed above, it is this latter rail line which is being used by Poplar Grove shippers. The Commission stated:

"Nor will we consider the potential abandonment of the Poplar Grove-South Beloit line before an application (or exemption request) has been filed. In the November 10 stay denial, we rejected petitioners' argument that C&NW is abusing the class exemption because it was part of its broader strategy to abandon the entire Chemung-South Beloit line. We noted that it is fully consistent with the RTP to permit a carrier to segment its lines and first move forward with the abandonment of those that are the least profitable, slip op. at 2. Petitioners' position would require a carrier to continue operating a clearly unprofitable and, as here, unused and unneeded portion of a line while it decided if, and when, it will seek to abandon the remaining line segment. Such a requirement would foster a wasteful use of carrier resources, which clearly is contrary to the RTP." (Pet. at 68a)

On petition for review before the U.S. Court of Appeals for the Seventh Circuit, petitioners argued that the abandonment should be denied because McLay and Edenfruit would be injured by virtue of losing access to the rail line, the Commission's finding as to the derailment repair was arbitrary and capricious, and that the Commission failed to properly consider potential environmental concerns on the adjacent Poplar Grove-South Beloit segment when it allowed the abandonment of the subject line.

Petitioners did not challenge the Commission's decision imposing labor protective conditions, nor did they suggest that additional protective conditions were necessary. Indeed, no labor issue was raised whatsoever on appeal until oral argument when Simmons suggested that the abandonment might somehow result in the loss of jobs, even though it was undisputed that no service had been provided over the abandoned line for several years.

The Seventh Circuit again concluded that substantial evidence in the record supported the Commission on the merits. However, the Court did not rule on the merits of petitioners' arguments, because it found that the petitioners lacked standing to bring them to the Court. With respect to Patrick Simmons, the Court found, as it had in the Acquisition Case, that Simmons' only alleged injury to rail labor is a possible loss of jobs. Once again, the Court concluded that rail employees' interest in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act, citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). *Simmons et al. v. I.C.C.*, 900 F.2d 1023, 1027 (7th Cir. 1990).

As to petitioners Edenfruit and McLay, the Court held that those petitioners failed to satisfy the third prong of the Article III standing requirements, to wit, that the

injury must be one that is likely to be redressed through a favorable decision, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) and *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). The Court concluded that the most that it could do in response to petitioners' request is to stop C&NW's abandonment of the line. Since the Court could not force C&NW to repair the damaged line, and only repair of the line would sufficiently redress the injuries alleged by petitioners, the petitioners failed to meet the third prong of the standing test outlined in the aforementioned citations. *Id.* at 1026.

The Court also noted that petitioners had alleged that the Commission did not use proper procedure in making its environmental impact findings. However, the Court pointed out that there was no allegation, either before the Commission or on appeal, that petitioners would be adversely affected by any environmental damage alleged to be caused by the abandonment. Indeed, petitioners did not even allege any specific environmental damage. The Court concluded that, in order to seek redress on this basis, the party seeking review must suffer "an injury in fact", to wit, the party must himself be among the injured, citing *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). As such, the environmental issue could not provide any basis for petitioners' standing. *Id.* at 1027.

A petition for rehearing and suggestion for rehearing en banc was subsequently denied.

ARGUMENT

I. THE COURT PROPERLY FOUND THAT SIMMONS HAD NO STANDING TO SEEK JUDICIAL REVIEW IN THE ACQUISITION CASE

The Seventh Circuit correctly decided that Simmons' alleged interest in job retention is not sufficiently within the zone of interests to be protected by the Interstate Commerce Act, so as to justify his standing in this proceeding. The Seventh Circuit's holding is amply supported by the decisions of this Court. This Court has repeatedly concluded that, in addition to satisfying the case or controversy requirement of Article III of the Constitution, the courts must determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Data Processing, supra*, 397 U.S. at 153.³ The test is a guide for deciding when a "particular plaintiff should be heard to complain of a particular agency action." *Clarke, supra*, 479 U.S. at 399. As the *Clarke* court held:

In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the *plaintiff's interests are so marginally related to or inconsistent with the purposes*

³ This test is a useful in applying section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. §702, which confers standing on a person "*Aggrieved by agency action within the meaning of a relevant statute*" (emphasis added). The APA is not intended to allow suit by every person suffering injury in fact. *Clarke, supra* 479 U.S. at 395. The complainant must not only be "adversely affected or aggrieved" (i.e., injured in fact), but must also come within the zone of interests to be protected by the relevant statute. *Id.*

implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit.

Id. at 399 (emphasis added). The test is meant to "exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 397 n.12.

The overall scheme of the Interstate Commerce Act is to stimulate change and improvement of the national rail system through transactions that increase its overall efficiency, while providing rail employee labor protection against resulting dislocations. Simmons' interest in job retention by preservation of the *status quo* is inconsistent with the statutory scheme and would frustrate rather than further the purposes of the Act.

The Interstate Commerce Act contains fifteen rail transportation policy objectives, only one of which addresses rail labor interests. It simply encourages "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12). Thus, as the Seventh Circuit properly determined, the Act was not meant "to protect a rail employee's interest in retaining his job." 909 F.2d at 190.

Nor does the Act contain any substantive provisions that would support job retention. Rather, the Act provides for either mandatory or permissive imposition of labor protective conditions in order to compensate employees who may be affected by a particular transaction. For example, Section 10901(e) permits, but does not require, certain protective conditions to be imposed in rail line sales. See *Pittsburgh & Lake Erie Ry. Co. v. RLEA*, 491 U.S. ___, 109 S.Ct. 2584, 2591 (1989). Similarly, Section 11347 requires the imposition of labor protective conditions in rail consolidations. The balance of the statutes cited by Simmons similarly require or permit imposition

of these protective conditions. These conditions provide a *financial/compensatory* remedy for employees affected by an ICC-authorized transaction. In providing for them, Congress meant to facilitate these transactions, not prevent them so that rail employees may *retain* their jobs.

Simmons attempts to confuse the concepts of "job retention" and "labor protective conditions." Pursuant to Congressional direction, the Commission has developed a single set of standard labor protective conditions, which it has modified slightly to fit the circumstances of particular types of transactions. For mergers and consolidations, the applicable protective conditions are those adopted in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom.*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); for abandonments, the conditions are those adopted in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979); for trackage rights transactions, they are those adopted in *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), *modified sub nom.*, *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom.*, *RLEA v. United States*, 675 F.2d 1248 (D.C. Cir., 1982). It is these labor protective conditions, and the enforcement thereof, which are within the zone of interests protected by the Interstate Commerce Act. No such zone of interests exists for the retention of rail labor jobs per se.

In line sale exemptions such as the case at bar, the Commission, in its discretionary authority, has determined that labor protective conditions will only be imposed on line sale transactions where "extraordinary circumstances" are shown. 1 I.C.C. 2d 810, 815, *Aff'd sub nom.*, *Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). At no point whatsoever in this proceeding, either

before the Commission or the Seventh Circuit, has Simmons made any attempt to argue or show the existence of “extraordinary circumstances” justifying imposition of labor protective conditions. Thus, Simmons has not set forth any relevant labor issue which would justify his standing to petition the Seventh Circuit for review of the Interstate Commerce Commission order.

Simmons claims that Section 10328(a) of the Interstate Commerce Act allows railroad employees to obtain judicial review of *any* Commission decision. But Section 10328(a) merely confers a right to *intervene* in a proceeding “that affects those employees” (emphasis added). While it assures rail labor of party status at the agency level, it does not thereby give rail labor standing to initiate judicial review of any and all ICC decisions. Simmons also cites *Brotherhood of Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 529 (1947) in support of his position. However, *Railroad Trainmen* merely relied upon Section 10328(a) in finding a right by rail labor to *intervene* in a suit to *enforce* an ICC order, i.e., a judicial proceeding which “arose” under the Act. That ruling most certainly does not extend to proceedings for review of any agency order brought under the Hobbs Act.

If mere party status below were sufficient to obtain judicial review, the zone of interest test would be thoroughly undermined. The Hobbs Act limits the right to seek judicial review of an agency’s decision to those who were parties before the agency. See 28 U.S.C. §§2323, 2348; *Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir. 1983). But it does not relieve courts from the need to address *who* may seek judicial review of *which* agency order(s). See e.g. *American Legal Foundation v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987). Participation in an agency proceeding does not, in and of itself, satisfy *judicial* standing requirements, *id.* at 89, since parties need not satisfy the

zone of interest test to have appeared before the Commission. Here, Simmons did not satisfy that zone of interests test.

Finally, Simmons attempts to latch onto the interests of third party shippers and the "public" in order to justify his standing to seek judicial review. However, it is well-established that a party cannot rest on the rights of third parties to establish standing. See *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Nor can he argue the public interest unless he has established standing in his own right. See *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).

An asserted right to have the government act in accordance with law is not sufficient alone to confer standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984). Nor is an interest in governmental efficiency that is no greater than that of the ordinary citizen/taxpayer. *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1048 (D.C. Cir. 1989). Consequently, Simmons cannot achieve standing as a private individual by combining his Article III injury with an asserted public interest. *Peoples Gas, Light & Coke Co. v. USPS*, 658 F.2d 1182, 1198 (7th Cir. 1981).

In sum, the Seventh Circuit's decision does not conflict with any decisions of this Court or other Circuit Courts of Appeal. And, the zone of interest test was properly applied. The only substantive rights which Congress has conferred on labor are compensatory in nature, and are intended as the appropriate remedy for the job displacement or wage losses resulting from carrier line sales. Permitting rail labor to prevent a line sale on the grounds that employees of the selling carrier have the right to retain their jobs on the line at issue, with their employing carrier, in perpetuity, would be inconsistent with the Interstate Commerce Act.

II. THE COURT PROPERLY FOUND THAT PETITIONERS HAD NO STANDING TO SEEK JUDICIAL REVIEW IN THE ABANDONMENT CASE

The Seventh Circuit's dismissal of the petition in the abandonment case, for lack of standing, is thoroughly in accord with the facts of this case and well settled precedent. In order for a party to have standing to seek judicial review of an agency order, three requirements must be met: (1) the party must suffer actual or threatened injury-in-fact from the agency's conduct; (2) the injury must be traceable to the challenged conduct and (3) the injury must be one that can be redressed by the Court through a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *City of Evanston v. Regional Transportation Authority*, 825 F. 2d 1121, 1123 (7th Cir. 1987), cert. denied, 484 U.S. 1005 (1988). Petitioners McLay and Edenfruit did not satisfy these requirements.

As the Seventh Circuit correctly pointed out, the most that it could do in this proceeding was to overturn the Commission's order which had refused to revoke the abandonment. It could not order C&NW to repair the severed track on the Chemung-Poplar Grove line so as to restore the serviceability of that line. As such, McLay's and Edenfruit's claim that they would suffer competitive injury by not being able to ship on the abandoned line would not be redressed in consequence of the Court's decision. They failed to satisfy the third prong of the standing test under Article III.⁴

⁴ It must also be pointed out the McLay and Edenfruit could hardly be considered rail shippers. The record before the Commission and the Seventh Circuit revealed that McLay had not shipped by rail since the 1970's and had shipped exclusively via

(Footnote continued on following page)

Petitioners claim that the Seventh Circuit's decision is inconsistent with this Court's holding in *Chicago and North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311 (1981). Although it is unclear from the petition exactly why petitioners think *Kalo* is applicable here, the fact is that *Kalo* has absolutely no applicability to the instant case. In *Kalo*, a mud slide had severely damaged a rail line, thereby cutting off *all* rail service to the shipper. Thereafter, the C&NW sought and received Commission approval for abandonment of the line. The shipper filed suit in state court seeking damages for the abandonment. This Court held that a state court action for damages relating to an abandonment was preempted by the Interstate Commerce Act. The holding in *Kalo* has nothing whatsoever to do with the issues in case at bar. Furthermore, *Kalo* does not even purport to deal with the circumstance, as here, in which an industry continues to have available direct rail service via a second, alternate line.

There is *nothing* in the Interstate Commerce Act which requires a carrier to route traffic over a particular rail

⁴ *continued*

trucks since that time. As to Edenfruit, the record revealed that it had shipped no cars in 1985, one car in 1986, and no cars in 1987 or 1988. Furthermore, those petitioners did not lose rail service by virtue of the abandonment. Assuming they ever decided to ship by rail (which is unlikely in view of their historical pattern), that service continued to be available via C&NW's western route to Poplar Grove. Thus, it is arguable that petitioners Edenfruit and McLay did not even satisfy the first prong of the three part test, in that they did not establish any injury-in-fact. However, the Seventh Circuit held that an allegation of competitive injury was sufficient to satisfy the first prong of the standing test.

The Court also noted that the "injury" claimed by petitioners was not traceable to the Commission abandonment order in view of the fact that the line had been severed.

line within its system. The Commission has consistently held that internal routing of rail traffic is a matter for managerial discretion. *People of Illinois v. I.C.C.*, 698 F.2d 868, 873 (7th Cir. 1983). Indeed, even if there had been *no* derailment on the Chemung-Poplar Grove line, C&NW could not be forced to route traffic over that line, so long as service was being provided to Poplar Grove shippers. Thus, there is simply no redressable injury traceable to the Commission's action in this proceeding, and the petitioners' claimed "injury" could not be redressed through the Seventh Circuit's decision. Plainly stated, the Interstate Commerce Act does not require a carrier to provide two alternate routes to shippers. Reversal of the abandonment decision would not and could not result in the restoration of rail service over the Chemung-Poplar Grove line.

The Seventh Circuit also concluded that the environmental issues raised by petitioners were insufficient to confer standing. The petitioners claimed that the Commission had improperly failed to consider any environmental impact which might occur to the adjoining Poplar Grove-South Beloit line by virtue of C&NW's abandonment of the Chemung-Poplar Grove line. However, the petitioners did not allege any specific environmental damage which might occur, nor did they allege how *they* would be injured through the Commission's action.

Under the first prong of the Article III standing test, it is well settled that the party seeking review must himself be among the injured. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). None of the petitioners, McLay, Edenfruit or Simmons satisfied this test.

Finally, the Seventh Circuit also concluded that Simmons' claim of possible loss of jobs by virtue of the abandonment was insufficient to satisfy the zone of interest

(prudential limitation) requirements of the *Data Processing* and *Clarke* decisions.

In the proceedings below, the Commission had imposed labor protective conditions pursuant to *Oregon Short Line R. Co.-Abandonment-Goshen*, 360 I.C.C. 91 (1979), which are the standard labor protective conditions imposed in abandonment proceedings to compensate any employees adversely impacted by an abandonment. Simmons did not challenge these labor protective conditions or offer any reason why they were insufficient in this proceeding. Indeed, no labor issue whatsoever was raised before the Commission.

On petition for judicial review before the Seventh Circuit, petitioners similarly did not raise *any* labor issues until counsel was pressed by the Court at oral argument as to exactly what injury rail labor allegedly suffered in this proceeding. At oral argument, counsel for petitioners alleged a possible loss of jobs. However, even if we assume, *arguendo*, a possible loss of jobs, notwithstanding the fact that no rail service was provided over this line (and consequently no jobs could have been lost), the Seventh Circuit correctly held that job retention does not satisfy the zone of interest test under *Data Processing* and *Clarke*.

The Interstate Commerce Act requires that the Commission reduce regulatory barriers to exit from the industry. 49 U.S.C. §10101a(7) Further, when the Commission authorizes an abandonment, Congress has mandated that the authorization contain provisions to protect the interest of employees. 49 U.S.C. §10903(b)(2) Thus, the labor protective conditions which have been embodied in *Oregon Short Line*, *supra*, are the substantive rights which Congress has conferred on rail labor. These rights are compensatory in nature and are intended as the appropriate

remedy for any job displacement or wage losses resulting from carrier abandonments. The necessary corollary is that rail employees do not have a protected interest in retaining their jobs.

Permitting rail labor to prevent a rail line abandonment on the grounds that the employees of the carrier have the right to retain their jobs, in perpetuity, is thoroughly inconsistent with the statutory scheme of the Interstate Commerce Act. Such a conclusion would be particularly inappropriate here where there are no jobs to be lost since the line was not providing any service. Accordingly, the Seventh Circuit's decision was entirely correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 15, 1991

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APPENDIX A

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Service Date
[Docket No. AB-1 October 14, 1988
(Sub-No. 221X)]

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT EXEMPTION—BOONE COUNTY, IL

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 6.5-mile line of railroad between milepost 67.5 near Che-mung to milepost 74 near Poplar Grove in Boone County, IL.

Applicant has certified (1) that no local traffic has moved over the line for at least 2 years, (2) that all overhead traffic previously routed over this line has been rerouted and (3) that no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective November 13, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues¹ and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2)² must be filed by October 24, 1988, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by November 3, 1988 with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

A copy of any petition filed with the Commission should be sent to applicant's representative:

Myles L. Tobin
Chicago and North Western
Transportation Company
One North Western Center
Chicago, IL 60606

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, resulting from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by October 19, 1988. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7316.

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: October 4, 1988

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee
Secretary

¹ A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See *Exemption of Out-of-Service Rail Lines*, 4. I.C.C.2d 400 (1988).

² See *Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the FEDERAL REGISTER on December 22, 1987 (52 FR 48440-48446).